United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1131
76-1160

To be argued by
THOMAS W. EVANS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- : Docket No. 76-1131
Docket No. 76-1160

JAMES SEELEY CYPHERS and :
JAMES W. FERRO,

Defendants-Appellants. :

- x

BRIEF FOR APPELLANT JAMES S. CYPHERS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	Index No. 76-1131
Plaintiff-Appellee,	:	76-1160
-against-	:	
JAMES FERRO and JAMES CYPHERS,	:	
Defendant-Appellants.	:	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT JAMES S. CYPHERS

Questions Presented

1. Whether James S. Cyphers ("Cyphers") was denied his right to a speedy trial under Rule 4 of the Rules of the U. S. Court of Appeals for the Second Circuit Regarding Prompt Disposition of Criminal Cases?

2. Whether the use of the U. S. mails after the alleged fraudulent scheme had been completed was sufficient to violate 18 U.S.C. § 1341?

3. Whether the evidence was sufficient to establish that Cyphers fraudulently obtained airline tickets so as to be acting in furtherance of a fraudulent scheme in violation of 18 U.S.C. § 1341?

4. Whether the evidence was sufficient to establish that Cyphers caused the mails to be used so as to violate 18 U.S.C. § 1341?

5. Whether the District Court erred in admitting evidence of prior, contemporaneous and subsequent wrongful acts allegedly committed by either Cyphers or James Ferro ("Ferro"), which acts were not relevant to the crimes charged in the indictments?

6. Whether District Court violated Cyphers' Sixth Amendment rights by not permitting him to act as his own counsel for purposes of summation to the jury?

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) given on March 5, 1976, after a jury trial, convicting Cyphers of three counts of mail fraud (18 U.S.C. § 1341) (74 Cr. 322, Counts I and II

and 75 Cr. 259, Count I), in a case originally commenced by an indictment dated September 18, 1973. On Indictment 75 Cr. 259 and Count I of 74 Cr. 322, Cyphers was sentenced to two terms of imprisonment of five years each, to run concurrently, and was required to pay a fine amounting to $2,000. On Count II of Indictment 74 Cr. 322, Cyphers was sentenced to a five-year term of incarceration and a $1,000 fine for a total of $3,000 in fines. Execution of the sentence on Count II of 74 Cr. 322 was suspended, and Cyphers was placed on probation for five years, to be served consecutively to the sentence imposed under Count I of 74 Cr. 322 and 75 Cr. 259.

By order of this Court dated May 7, 1976, Thomas W. Evans, Esq. was appointed as counsel for Cyphers on appeal, pursuant to the Criminal Justice Act; and by order dated June 8, 1976, the two judgments involved in this case were consolidated for purposes of appeal.

Statement of Facts

A. Arrest and Indictment 73 Cr. 848*

On March 20, 1973, based on Postal Inspector Robert McDowall's complaint charging Cyphers with,

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* Indictment 73 CR. 848, and Indictments 74 Cr. 322 and 75 CR. 259 which are more fully described below, are included as part of Exhibit B to the joint appendix to appellants' briefs.

inter alia, a fraudulent scheme to obtain airline tickets by use of credit cards, Cyphers was arrested while he and his wife were in an apartment leased by Ferro in which all three resided. Acting pursuant to a purported consent obtained from Cyphers, the postal inspector who arrested him searched the apartment and seized some credit cards, documents and other materials found there.

On September 18, 1973, an indictment was filed in the Eastern District of New York charging Cyphers and Ferro with forty-three counts of mail fraud (Indictment 73 Cr. 848).* As part of the scheme alleged, Cyphers was charged with defrauding airline companies by obtaining tickets through the use of lost, stolen and/or altered credit cards. Count XX of that indictment charged that, for the purpose of executing the alleged fraudulent scheme, in February 1973, Cyphers and Ferro caused a letter to be delivered to Dr. I. Simon.

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* On May 17, 1973 Cyphers was indicted in New York County for forgery in the second degree, criminal possession of a forged instrument in the second degree, petit larceny and criminal impersonation in connection with one of the acts charged in Indictment 73 Cr. 843, the alleged misuse of the Fred Preston Staff credit card. The state indictment was dismissed on January 22, 1975 on the recommendation of the acting district attorney. See Exhibit G to the joint appendix.

On September 19, 1973, the Government filed a notice of readiness for trial (Record on Appeal, Document #3, 73 Cr. 848). On September 20, 1973 Cyphers was arraigned without counsel, and on October 12, 1973 Marvin Preminger, Esq. was assigned to represent him.

After two motions to dismiss and a motion to sever, followed by a number of adjournments, Indictment 73 Cr. 848 was dismissed on April 5, 1974, on the grounds that under the ruling in United States v. Maze, 414 U.S. 395 (1974), the offenses charged in that indictment did not constitute a "using of the mails." Indeed, the Court suggested that if the Government wanted to file a superseding indictment, it would have to be brought under a different statute. (April 5, 1974, at 5.)*

At the hearing on that date the Government requested that the indictment be dismissed but announced it would "get a superseding indictment on this." (April 5, 1974 at 3.) At the specific concurrence of the Government, Cyphers was continued to be held in federal custody on bail, despite his objection, and the Government was given three weeks by the Court (Travia, J.) to file its superseding indictment. (April 5, 1974, at 4, 7.)

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* References to the record of pre-trial proceedings will be cited by the date of the proceeding and the page number of the record.

B. Indictment 74 Cr. 322

On April 23, 1974, the Government filed its superseding indictment, charging Cyphers and Ferro with two counts of mail fraud. The scheme alleged in 74 Cr. 322 was the same one charged in the indictment which was dismissed for failing to come within the coverage of the mail fraud statute. The superseding indictment charged Cyphers and Ferro with defrauding airline companies by obtaining tickets through the use of lost, stolen and/or altered credit cards. Count XX of Indictment 73 Cr. 848 was realleged as Count I of Indictment 74 Cr. 322.* In addition, Count II of the superseding indictment charged that pursuant to the same scheme, on February 19, 1973, Ferro and Cyphers had caused to be mailed to Dr. Stuart Sylvan a letter containing fraudulently obtained airline tickets. On May 3, 1974 Cyphers and Ferro were once again arraigned and Cyphers' bail was continued.

On May 13, 1974, the Government filed its second notice of readiness for trial (Record on Appeal, Document #4, 74 Cr. 322).

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* The Assistant U.S. Attorney stated in an affidavit that Count XX of Indictment 73 Cr. 848 "formed the basis for the superseding indictment" (Record on Appeal, Document #21, 75 Cr. 259). Specifically, Count I of 74 Cr. 322 charged that on February 3, 1973, a letter containing fraudulently obtained airline tickets had been mailed to Dr. I. Simon.

Cyphers and Ferro moved to dismiss the superseding indictment. Relying on the authority of United States v. Maze, supra, they contended that the mailings alleged were not sufficiently connected with the fraudulent scheme charged to satisfy the requirements of 18 U.S.C. § 1341. This motion was denied in an opinion dated June 11, 1974.*

On February 21, 1975, a conference was held to schedule a trial date. At that time, the Government stated that it was unprepared for trial. Although Cyphers and Ferro were ready to proceed, the case was adjourned to February 28, 1975 (February 21, 1975, at 2-3). On February 28, the Assistant U.S. Attorney informed the District Court that a long delay was necessary because of the illness of one of their witnesses. The proceedings were adjourned to March 14. On March 21, 1975,** the case was adjourned to April 4, 1975.

C. Indictment 5 Cr. 259

On April 1, 1975, yet a third indictment was filed charging both Cyphers and Ferro with one count of mail fraud. This indictment alleged that on February 26, 1973,

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* The opinion is Exhibit D to the joint appendix.

** No record of a court appearance on March 14, 1975, was noted on the docket sheet.

pursuant to the scheme already charged in Indictment 74 Cr. 322,* (which, as already noted, was the same scheme charged in the original indictment dismissed under the authority of U.S. v. Maze, supra) fraudulently obtained airline tickets had been mailed to Dr. I. Simon.** More than two months later, on June 6, 1975, the Government filed its third notice of readiness for trial.

On May 21, 1975, Judge Platt reassigned the case to Judge Watson, a Court of Claims judge, who was assigned to sit in the Eastern District of New York during the summer of 1975. On June 2, Judge Watson set July 28, 1975 as the date on which the trial would be commenced.*** On August 18, 1975, Judge Watson informed counsel that he would be unable to try the case during the period of his assignment to the Eastern District and therefore would return the case to Judge Platt (August 18, 1975 at 5).

Cyphers demanded an immediate trial. His trial counsel pointed out how burdensome the prolonged delays had

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* At trial, the jurors considered Indictment 75 Cr. 259 to be a third count of 74 Cr. 322. This view was confirmed by the District Court (T. 572). (Numerals in parentheses preceded by "T" refer to pages of the trial transcript.)

** For all that appears in the indictments, Count XX of Indictment 73 Cr. 848 could have been realleged either as Count 1 of 74 Cr. 322 or Count 1 of 75 Cr. 259, as Count XX refers only to mailing of airline tickets to Dr. Simon in February, 1973.

*** June 2, 1975 at 5.

become upon Cyphers. Judge Watson apologized, but said there was simply not enough judicial manpower available to grant the request (August 18, 1975 at 5-7). After the case was held over to November 14, 1975, it was then adjourned until January 5, 1976.*

D. The Trial

The trial of Cyphers, along with Ferro, commenced on January 5, 1976, thirty-four months after his arrest and thirty months after his original indictment. Indictments 74 Cr. 322 and 75 Cr. 259, charging Cyphers and Ferro with three specific violations of the mail fraud statute, were tried jointly.

1. Evidence Relevant to Crimes Charged

The specific crimes charged were that Cyphers and Ferro on February 3, 1973 had caused a letter to be mailed to Dr. I. Simon containing fraudulently obtained airline tickets (74 Cr. 322 Count I); that Cyphers and Ferro on February 19, 1973 had caused a letter to be mailed to Dr. Stuart Sylvan containing fraudulently obtained airline tickets (74 Cr. 322 Count II); and that Cyphers and Ferro

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* Despite its previous opposition, on November 14, 1975 the Government stated that it was amenable to trying Ferro separately from his co-defendant, Cyphers.

on February 26, 1973 had caused an additional letter to be mailed to Dr. Simon containing fraudulently obtained airline tickets (75 Cr. 259).

With regard to the charge that the tickets forming the basis for 75 Cr. 259 were fraudulently obtained, the Government adduced a sales slip showing the purchase of the tickets there involved were made by a credit card bearing the name Richard Redstrom (T. 125, 132-34) (GX. 32)*; as well as the actual tickets so purchased (T. 134, GX. 45, 46). The Government also adduced opinion testimony through James Hamrick, a document analyst for the United States Postal Service, that the signature on the sales slip was written by Ferro; and that the signature on a driver's license bearing the name Richard Redstrom (GX. 32) was written by Ferro (T. 301). As to the use of the mails involving the tickets referred to in 75 Cr. 259, Dr. Simon said he ordered tickets through George Nagin in the latter part of February 1973, and that he subsequently received these tickets (GX. 45-46) in the mail (T. 248-50).

With regard to the airline tickets forming the basis of the charges in Counts I and II of 74 Cr. 322, the Government introduced no evidence, testimonial or docu-

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* Numerals in parentheses preceded by "GX" refer to the exhibit numbers of the Government's exhibits in evidence.

mentary, indicating how these tickets were obtained; whether they were fraudulently obtained; or whether they were ever paid for.

With reference to the use of the mails as to the tickets involved in 74 Cr. 322, Count I, Dr. Simon testified that he ordered a set of airline tickets through Nagin in early February 1973 and received the tickets in the mail a few days thereafter (T. 244-45, 253, 256). As to the tickets involved in Count II of that indictment, Dr. Sylvan testified that he received an airline ticket in the mail in February of 1973 (T. 231-32) that Dr. Simon had admitted ordering for him (T. 247).

The only other evidence offered by the Government that purported to relate directly to the mailings charged in the indictment was a sheet of paper seized in Ferro's apartment which contained the name "Dr. Simon", a telephone number, the words "New York, Atlanta, New York" and the words "Mr. Sylvan, 19 Robbin Way, Great Neck, New York" (GX. 18) (T. 60).

There was no evidence, testimonial or documentary, indicating that Cyphers personally used or caused the use of the mails. Dr. Simon testified that he assumed, but did not know, that Mr. Nagin mailed him the tickets (T. 255-56); and Nagin disclaimed knowledge of how or whether the tickets

were transmitted to Dr. Simon (T. 204).

There was no evidence, either directly relating to the mailings charged, or in connection with the evidence of other alleged wrongful acts adduced by the Government, which showed that the use of the mails was a necessary or foreseeable part of the criminal scheme alleged against Cyphers. To the contrary, there was evidence in the pretrial proceedings that the use of the mails was not a part of the numerous other wrongful and/or fraudulent acts alleged against Cyphers, which fact required the Government to dismiss voluntarily the forty-three counts originally charged against Cyphers (Indictment 73 Cr. 848; see April 5, 1974 at 5).

The only evidence linking Cyphers to the sale of the tickets per se related to the charges in 74 Cr. 322 Count I, and was contained in the following testimony of Nagin:

> Q. [Mr. Kramer] And can you describe how this transaction occurred?
> A. [Mr. Nagin] How it occurred-- He [Dr. Simon] gave me some dates or something like that -- dates, which I gave to Mr. Cyphers, and then I think Dr. Simon gave me the money and Mr. Cyphers picked the money up, and after that I don't know what transpired.
> Q. By "Mr. Cyphers," you refer to Mr. Cyphers here -- he picked up the money?
> A. It was either Mr. Cyphers or his nephew.
> Q. His who?
> A. Nephew.
> Q. Who is that?
> A. Some young fellow.
> Q. Do you see that man in the courtroom here?
> A. That's the gentleman in the corner --
> MS. SELTZER: Indicating the defendant Ferro.
> THE WITNESS: Mr. Ferro. (T. 197)

Nagin indicated, but did not elaborate, that Dr. Simon, on one occasion thereafter, purchased tickets through him in like fashion, but Nagin did not name Cyphers as the source of these tickets (T. 198). Nagin testified that he believed in March 1973 he gave Dr. Simon a telephone number at which Nagin said he could reach Cyphers. Although Nagin indicated he had called the number himself on several occasions, he did not state whether he actually spoke with Cyphers at that number (T. 199-200). Nagin did state, however, that he never called Cyphers at that number for the purpose of ordering fraudulently obtained airline tickets (T. 211-12).

Dr. Simon testified in regard to the tickets involved in Count II of 74 Cr. 322, in partial contradiction of Nagin's testimony, that Nagin had told him to call "Jimmy", a man Dr. Simon previously described in a manner not resembling Cyphers (T. 246-48). (In fact, Dr. Simon subsequently admitted that while he had met with "Jimmy" (T. 246), he did not recognize Cyphers (T. 256).) Nagin gave Dr. Simon "Jimmy's" telephone number and then, Dr. Simon simply said:

> "I called and I got a telephone answering machine. I left my number. About an hour or an hour and a half later I received a call, I guess from Jimmy. I told him what I wanted." (T. 251).

In regard to whether the alleged mailings were in furtherance of the fraudulent scheme as required under 18 U.S.C. §1341, the evidence from the Government's witnesses was clear and uncontradicted that in all instances full payment had been made for the tickets described in the indictment before they were mailed. (Nagin, T. 197-98; Simon, T. 244, 248, 256.)

2. Evidence of Prior Similar Acts*

The Government introduced the following evidence of prior wrongful acts: Three credit cards, two Florida drivers' licenses, a lighting fixture, six envelopes containing numerous slips of paper (GX. 16-21), various charge slips, and five bulletins used by credit card companies to identify lost or stolen credit cards were admitted into evidence (T. 43, 46, 49, 56, 63). One of the credit cards and one driver's license were issued to Arthur Mastmond (T. 42, 47); another credit card and driver's license bore the

* The District Court told the jurors: "All 16 through 21 [referring to the numbers of the Government's exhibits] are showing the scheme, plan or similar act except for part of 16, that is what the Government hopes to connect to the mailings." (T. 61)

name Douglas Eppollito (T. 42, 46).

Frank McDonald, an employee of Eastern Airlines, testified that the Douglas Eppollito credit card had been issued in 1969 to Douglas E. Pollitt, a lawyer with a New York City law firm (T. 88); that it had been reported lost in 1973 (T. 89, 91); and that the Mastmond card had been issued to Arthur Simon of Moco Products, Inc., and not to Arthur Mastmond (T. 107).

In addition, various credit card charge slips, not relevant to the specific counts alleged, and which reflected purchases of airline tickets with those cards originally issued to Pollitt (T. 92, 94) and Simon (T. 111-112), were admitted in evidence, as were six envelopes (GX. 16-21), a credit card bearing the name of William McKinley of Allenwood Steel Company and charge slips reflecting purchases with that card (T. 144-145) (GX. 39, 48) (T. 265). McDonald testified that the charge slips for tickets purchased with the Pollitt card were not paid (T. 101, 104).

Richard Rooney, an employee of United Airlines, testified that the McKinley credit card had been issued to William Finley; that it had been reported lost or stolen; and that the purchases reflected by the charge slips (GX. 39) were unpaid (T. 138, 145a). William Finley testified that his credit card was lost on October 17, 1972 (T. 164-165); that he never authorized anybody to sign for him (T.166);

and that the signature on the charge slips (GX. 39) was not his (T. 167).

June Roberts, a ticket agent for Eastern Airlines, identified Ferro (T. 266) as the person who had used the McKinley card in an attempt to purchase three airline tickets at a ticket office in Baltimore (T. 263-267). Xerox copies of these tickets were admitted in evidence (GX. 49) (T. 266).

In addition, Scott Kale, a clerk at Doubleday Book Shops, testified that Cyphers purchased a phonograph record album with a credit card issued to Fred Preston Staff (T. 168-74) (see GX. 41; see also GX. 42A, 42B, 42C). Kale then contradicted this testimony, later admitting that he did not remember that it was Cyphers who actually signed the card (T. 186).

James Hamrick, the Government's document analyst, stated that in his opinion the signature on the Eppollito and Mastmond credit card charge slips and drivers' licenses were written by Ferro (T. 306, 309), as were the signatures on the McKinley credit card and charge slips (T. 310).

3. Pro Se Summation

Although Cyphers expressly requested the right to act as his own counsel, Judge Platt inexplicably conditioned

the request on Cypher's not being allowed to sum up to the jury on his own behalf. (January 8, 1976 at 8.)

4. Charge to the Jury

With reference to the fraudulent acts or conduct required to constitute a violation of 18 U.S.C § 1341, the trial court charged:

> The essential elements which are required to be proved beyond a reasonable doubt in order to establish the offenses charged in the indictment are as follows: One an act or acts of having devised a scheme or artifice to defraud or to attempt to defraud.
>
> The mail fraud statute, violation of which is charged here, requires only that there be a scheme to defraud and not actual fraud . . . .
>
> Again, a scheme to defraud under the mail statute means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons ordinarily prudent. The government must prove that the defendants participated in such plan and that the scheme, artifice, false and fraudulent pretenses, were made by them or their agent, knowing they were false and with the intent to defraud. It is not necessary, however, that any person was actually defrauded by the scheme. Nor is it necessary that the government prove all the pretenses and acts charged in the indictment. It is essential only that one or more of them be proved to show the existence of the scheme (T. 544, 548-49).

With regard to the use of evidence of other wrongful acts, the trial court charged:

> Evidence as to an alleged similar act may not . . . be considered by the jury in determining whether the accused did the acts charged in the indictments . . . .
>
> If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused

did the acts charged in the indictments then the jury may consider evidence as to an alleged earlier or simultaneous similar act in determining whether there was a plan, scheme, or design, or a state of mind, knowledge or intent with which the accused did the acts charged in the indictments. And where all the elements of the alleged earlier or simultaneous similar act are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the acts charged in the indictments the accused acted pursuant to a plan, scheme, or design or acted willfully, knowingly and with specific intent and not because of mistake or accident or for an innocent reason (T. 552-53).

5. Verdict

The jury, after deliberating for approximately three hours, found Cyphers and Ferro guilty as charged on all three counts in the two indictments.

POINT I

CYPHERS WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AS REQUIRED BY THE RULES OF THIS COURT

Rule 4 of the plan for achieving prompt disposition of criminal cases states that:

> "In all cases the government must be ready for trial within six months from the date of arrest. . . ." (Plan for Achieving Prompt Disposition of Criminal Cases Effective April 1, 1973).

"Ready for trial" within the meaning of this Rule requires that all necessary preliminary steps be completed

and that nothing remains except to proceed to the trial itself. In other words, the defendant must have been indicted (or waived indictment), arraigned, entered a plea, and the Government must have filed its notice of readiness -- all within the prescribed six months. United States v. Bowman, 493 F.2d 594 (2d Cir. 1974).

Cyphers was arrested on March 20, 1973; the initial indictment (73 Cr. 848) was handed up on September 18, 1973; the Government's notice of readiness was filed the following day, and Cyphers was arraigned and entered a plea of not guilty on September 20, 1973, six months to the day from the time of arrest. If nothing remained to be done but try the defendant, Rule 4 would not have been violated.

However, on April 5, 1974 the Government -- having five months earlier filed its first notice of readiness -- requested the indictment be dismissed but insisted Cyphers continue to be held in custody while a superseding indictment was obtained (See April 5, 1974 at 3-9). This superseding indictment, 74 Cr. 322, was filed on April 23, 1974, and it was not until May 13, 1974 that the Government filed its "second" notice of readiness (Record on Appeal

Document # 4).*

Even giving the Government the benefit of every reasonable construction of Rule 4 by tolling the time the Government might have been ready to go to trial on Indictment 73 Cr. 848, nevertheless, the facts are these. Cyphers was arrested on March 20, 1973 and the Government was not ready to go to trial until September 20, 1973, six months thereafter. By its own voluntary act of dismissing the first indictment the Government was also not ready to go to trial between April 5, 1974 and May 13, 1974. Because Cyphers was in federal custody during the period March 20, 1973 through May 13, 1974, inclusive, the entire period the Government was not ready to go to trial must be cumulated for Rule 4 purposes. Cf. United States v. Flores, 501 F.2d 1356 (2nd Cir. 1974).

As this cumulative period totals in excess of seven months, because there is no de minimus exception to Rule 4, even if this substantial delay could be termed de minimus Rule 4 was still violated. United States v. McDonough, 504

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* Cyphers' counsel attempted to have Cyphers released from custody while the superseding indictment was being sought, and began to object to Cyphers' not getting a speedy trial at this hearing. However, the trial court summarily terminated any further argument on this point by ruling that bail for Cyphers would be continued, the Government would have three weeks to obtain a superseding indictment, and only if the Government failed to obtain such indictment by the end of the three-week period would the court accept a motion to dismiss. (April 5, 1974 at 4-5).

F.2d 67 (2d Cir. 1973).* Accordingly, Cyphers should not have been tried at all, and the indictments should have been dismissed. Therefore, his conviction now should be reversed and the indictments dismissed.

The recognized exceptions to Rule 4 (see generally, Hilbert v. Dooling, 476 F.2d 355 (2d Cir.), cert. denied, 414 U.S. 878 (1974)) are not applicable here. Certainly, some mail fraud cases are difficult to prepare, cf. Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965). Thus, the particular facts of a mail fraud case may qualify the Government for an exception under Rule 5(c)(ii), excluding from computation of the six-month period that time during which the Government is actively preparing its case for trial; or qualify it for an exclusion because the additional time is

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* Any argument that the Supreme Court's decision in United States v. Maze, 414 U.S. 395 (1974) necessitated its re-evaluation of the case, and the superseding indictment is not applicable because such an approach ignores the realities of this case. The superseding indictment, 74 Cr. 322, was based on Count XX of Indictment 73 Cr. 848 (Record on Appeal, Document # 21, 75 Cr. 259). Thus, the Government could have proceeded to trial on the original indictment and simply have withdrawn from the jury's consideration any counts on which insufficient evidence existed to justify a federal prosecution, see generally, United States v. Dawson, 516 F.2d 796 (9th Cir.), cert. denied, __ U.S. __ 96 S. Ct. 796 (1975). Instead, Cyphers was continued in the custody of the Government during the period where no pending indictment existed against him (April 5, 1974 at 4, 7). The Government should not be permitted to have it both ways, i.e. to maintain people in custody, whether or not it is in a position to proceed against them in a court of law. Cf. Flores, supra.

justified by exceptional circumstances.

But the facts of this case preclude resort to the any such exceptions. The superseding indictment is based upon Count XX of the original indictment, 73 Cr. 848 (Record on Appeal, Document # 21, 75 Cr. 259). Thus, there clearly was no ongoing additional preparation of the case against Cyphers that justifies the delay here. No new facts were being developed in the six week period between the dismissal of 73 Cr. 848 and the Government's notice of readiness on 74 Cr. 322.

In Barker v. Wingo, 407 U.S. 514 (1972) the Supreme Court succinctly summarized the societal interest furthered by affording all defendants -- whether in custody or out on bail -- a speedy trial:

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair proceedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately

convicted.

> Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.
>
> If an accused cannot make bail, he is generally confined. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." At times the result may even be violent rioting. Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across the Nation. In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners. 407 U.S. at 519-21.

Cyphers was arrested on March 20, 1973. Through no fault of his, the Government was not prepared to bring him to trial until 13 months later. For over seven of those months there is not even a claim that the Government could, or was ready to, proceed. The societal interests set forth in Barker, supra, and facilitated by Rule 4, were certainly thwarted by this delay.

A fortiori, the third indictment, 75 Cr. 259, which arose from the same scheme alleged in 73 Cr. 848, and which was not filed until April 1, 1975, when Cyphers had been in federal custody well over two years, was untimely under Rule 4 as well.

Therefore, Cyphers was denied his right to a speedy trial, the conviction appealed from should be reversed, and the indictments under which he was charged dismissed.

POINT II

THE ALLEGED USE OF THE MAILS SUBSEQUENT TO, AND NOT IN FURTHERANCE OF, THE ALLEGED FRAUDULENT SCHEME DOES NOT CONSTITUTE A VIOLATION OF 18 USC §1341

Even if it is assumed, arguendo, that Cyphers is the author of a fraudulent scheme, the Government has still failed to prove its case. Not every fraudulent scheme or plan constitutes a violation of 18 U.S.C. §1341 just because the Government is able to point to some usage of the mails. The federal mail fraud statute is not applicable merely because the mails are in fact used as the result of a fraudulent scheme, but only where the Government has proven beyond a reasonable doubt that the defendants caused the mails to be used in furtherance of that scheme. United States v. Maze, 414 U.S. 395, 405 (1974); see also United States v. Finklestein, 526 F.2d 517, 526 (2d Cir. 1975), cert. denied, ___ U.S. ___, 92 S. Ct. 1742 (1976).

The essence of the Maze decision, supra, is that where the mailings do not play a significant part in enabling the defendant to acquire dominion over the funds he seeks to obtain fraudulently there is no violation of 18 U.S.C. §1341. Therefore, once the scheme has reached fruition -- that is, once the accused has fully accomplished his fraudulent

purpose -- his scheme is completed; and as it is completed, the subsequent use of the mails, even though incidentally related to the scheme, can in no way be in furtherance of it. See Kann v. United States, 323 U.S. 88, 95 (1944), as quoted in Maze, supra, 414 U.S. at 608; see also United States v. Sampson, 371 U.S. 75 (1962).

It appears from the record that the Government attempted to prove a fraud* which may be summarized as follows: Acquire and alter credit cards in order to purchase airline tickets which could then be sold at a profit. The purpose of the scheme is apparent -- obtain that profit. Once the seller of the tickets got the cash in hand, he had accomplished all he set out to do. He had made his profit. See Parr v. United States, 363 U.S. 370, 392-93 (1960); Kann, supra, 323 U.S. at 94-95.

The Government's own proof shows that as to each count of the indictments, the purchaser paid cash in advance, before any mailing was made (T. 197-98, 244, 248, 256). Thus, any fraudulent scheme would have been no less successfully consummated had the airline tickets never been delivered. Nothing that happened after the money was paid could have had any effect upon the successful completion of the scheme, i.e. to obtain payment.

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* As shown in Points III and IV, infra, no such fraud has been proven.

It follows, then, that the alleged use of the mails to deliver these tickets was subsequent and merely incidental to the consummation of the fraudulent scheme, and not in furtherance of it. Cyphers simply did not violate 18 U.S.C. § 1341. Maze, supra; Parr, supra; Kann, supra.

The issue before this Court is not whether Cypher's conduct was unusual or suspicious, or even whether it amounted to common law fraud. The question is whether this conduct constitutes a violation of federal law, and as Mr. Justice Rehnquist stated in Maze, supra:

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be for the purpose of executing such scheme or artifice. . . . 414 U.S. at 405.

The Government failed to prove a violation of 18 U.S.C. § 1341, as charged, and the convictions appealed from should therefore be reversed.

POINT III

THE EVIDENCE WAS NOT SUFFICIENT TO SHOW CYPHERS FRAUDULENTLY ACQUIRED THE AIRLINE TICKETS AS CHARGED IN THE INDICTMENTS

The Government has not met its burden of proof on any of the three counts which alleged three separate, fraudulent acquisitions of airline tickets. While the Government

introduced testimony from which it could be found the tickets were mailed, although, as discussed in Part IV infra, not who mailed them (T. 231; 248-49), the Government has not shown that Cyphers fraudulently obtained these tickets. In one instance (75 Cr. 259) there is insufficient evidence linking Cyphers to the acquisition of the tickets, and in the other two instances (74 Cr. 322 Counts I and II), the record is completely barren of any evidence as to how the tickets described in the indictments were obtained.* The Government merely showed the mails were used, but it did not meet its burden of proving the necessary fraudulent acquisition.

Where there is no sufficient legally admissible evidence to support any single element of a crime, a conviction of such crime may not stand. United States v. Freeman, 498 F.2d 569 (2d Cir. 1974). In a mail fraud case, a fraudulent act, artifice or scheme charged must be connected to a specific mailing for there to be a violation of 18 U.S.C. § 1341. United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970). If a mailing does not relate to a particular attempt to defraud -- that is, if it relates to a transaction which is not part of any alleged fraudulent

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* In all three counts the Government alleges, as a material element of the crime, that the tickets mailed were fraudulently acquired. (74 Cr. 322, Count I; Count II 742; 75 Cr. 259, Count I.

"scheme or artifice" -- that mailing will not support a charge of mail fraud. McClendon v. United States, 2 F.2d 660 (6th Cir. 1924).* As shown below the Government has failed to connect to the mailing the particular fraudulent scheme charged in any of the three counts.

a) 75 Cr. 259

The Government adduced the sales slip indicating that the purchases of the two tickets involved in 75 Cr. 259 were made on an altered credit card, falsely signed in handwriting opined to be Ferro's (T. 135, 309).

As to these tickets, the record reveals that, even if viewed most favorably to the Government, the evidence established that Ferro fraudulently obtained the tickets involved (T. 134, 307) and that Dr. Simon, after telephoning a number given him by Mr. Nagin, and leaving an order for the tickets on a telephone answering device, paid for the tickets upon picking them up from somebody other than Cyphers (T. 246-47, 256). There is no evidence tying Cyphers

* Analytically, this may be viewed as an other way of looking at the "purpose" element of the mail fraud statute. Under this statute, the mailing must be "for the purpose of executing the scheme." Kann, supra, 323 U.S. at 94. This Court, as stated in Point II, supra, has defined this "purpose" element as meaning that the Government must show that the mails were used "in furtherance of" the fraudulent scheme or artifice. Finkelstein, supra, 526 F.2d at 526-27. The issue discussed in this Point III is whether the mailing relates to an act designed to defraud, i.e. the "scheme to defraud" within 18 U.S.C. § 1341.

to this count, save for the fact that both he and Ferro were arrested together (T. 35-36).

However, this fact did not legally permit the jury to consider as against Cyphers evidence of wrongful acts committed by Ferro. Cyphers' presence at the time of Ferro's arrest could be used against Cyphers only if he and Ferro were acting in concert to commit the crime alleged. The proof of that concerted action must be made by independent evidence of a criminal agreement between the parties, and not by evidence admissible only after such an agreement is proven. In the absence of such independent evidence, a mere showing that one co-defendant has committed acts in violation of the law while the other was present is not admissible as evidence against the latter. United States v. Wright, 491 F.2d 942, 946 (6th Cir. 1974), cert. denied, 419 U.S. 862 (1975).

Here, the defendants were not charged as co-conspirators, and no substantial independent evidence shows they were acting pursuant to a criminal agreement to commit the crimes charged in 75 Cr. 259. Indeed, all that exists relevant to Cyphers' involvement in the specific crime is that the telephone number Dr. Simon said he called to order these tickets from "a person named Jimmy" (but not Cyphers) was listed by the phone company as being installed in the apartment occupied by Cyphers (T. 394-95). Inasmuch as the

Government itself advocated the position, supported by the evidence from the Government's witnesses, that Cyphers and Ferro were residing together (T. 35, 476), it is not surprising that telephone calls to Ferro were made to a number installed in the apartment occupied by Cyphers.

What the Government has not adduced proof of, however, is that Dr. Simon's phone call to this number was directed to or received by Cyphers. If any fraud was shown at all it was Ferro's fraud, and the independent evidence required by Wright, supra, 491 F.2d at 946, to make Cyphers chargeable with it is totally lacking.

b) 74 Cr. 322

The Government's case against Cyphers was insufficient as to the allegations in 75 Cr. 259; it is nonexistent as to 74 Cr. 322.

As to the two sets of tickets alleged to be fraudulently obtained in 74 Cr. 322 Count I and Count II, the record speaks for itself. And it is silent. For all that appears on the record the tickets may have been paid for. There is simply no evidence that they were stolen. Indeed, as Cyphers was presumptively innocent, until evidence to the contrary is adduced it must be accepted that if he acquired these tickets at all, he acquired them lawfully. Thus, even

assuming, arguendo, Cyphers caused the tickets to be mailed, this alone could not constitute a violation of 18 U.S.C. § 1341 since no fraud or intent to harm was involved. Kann v. United States, 323 U.S. 88 (1944); United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970).

Of course, none of the Government's evidence of wrongful acts other than those charged in 74 Cr. 322 can supply the missing proof, since these other acts could not be considered unless and until it found beyond a reasonable doubt that Cyphers had performed the acts charged in the indictment (T. 552-53). As there was no evidence on which this finding could be made, any consideration of other wrongful acts was necessarily erroneous. See e.g. Tarvestad v. United States, 418 F.2d 1043, 1048 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970); United States v. Interstate Engineering Corp., 288 F. Supp. 402, 413 (D. N.H. 1967), aff'd, 400 F.2d 58 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969).

No evidence in the record as to the specific fraudulent acquisitions of the tickets charged is, of course, insufficient evidence to establish mail fraud beyond a reasonable doubt as required under any test. Indeed, with no evidence in the record, it would be a violation of Cyphers' due process rights to uphold the jury's finding

that he fraudulently obtained these tickets. Gregory v. City of Chicago, 394 U.S. 111 (1969).

Therefore, as there was no evidence linking Cyphers to the fraudulent acquisition of the tickets alleged in 74 Cr. 322 and 75 Cr. 259, and for the foregoing reasons, his conviction on those charges must be reversed.

POINT IV

THE EVIDENCE IS NOT SUFFICIENT TO PROVE CYPHERS KNOWINGLY CAUSED THE MAILS TO BE USED FOR THE PURPOSE OF EXECUTING A FRAUD

To establish a violation of 18 U.S.C. § 1341 the Government must prove beyond a reasonable doubt that the defendant placed the tickets in the mails, or "knowingly caused" the use of the mails for the purposes of executing a fraud. United States v. Finkelstein, supra.

The Supreme Court has construed the causation requirement as meaning that by the nature of the defendant's fraudulent activity the use of the mails is reasonably foreseeable. Pereira v. United States, 347 U.S. 1, 8-9 (1954). Here, there is no evidence that Cyphers conducted any activity where the use of the mails would follow in the ordinary course of business, as, for example, in United

States v. Weisman, 83 F.2d 470 (2d Cir.), cert. denied, 299 U.S. 560 (1936). In fact, the Government does not even contend this to be the case.

Rather, the Government appears to rest upon the argument that the use of the mails was "reasonably foreseeable" as that phrase is used in this Court's recent opinion in Finkelstein, supra, 526 F.2d at 526-27. A brief analysis of the facts in this case shows this claim is baseless.*

It could not have been foreseeable to Cyphers that the mails would be used to further the frauds for which he was indicted for two reasons. First, the record shows that the dentists who ultimately obtained the airline tickets did so initially through Dr. Simon's personal contact with Mr. Nagin. (T. 244-45) The record also shows that Mr. Nagin and Dr. Simon were old friends. (T. 191-92, 243) In fact, Dr. Simon was Mr. Nagin's dentist and Mr. Nagin was Dr. Simon's jeweler. (T. 191-92) They both had vacation homes in Florida together. (T. 192) It was Mr. Nagin who told Dr. Simon he could get him discounted airline tickets (T. 192).

It is clear, then, that the plan contemplated personal delivery by Mr. Nagin to Dr. Simon. The record

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* In fact, there is such a paucity of evidence here that one can only conclude that Cyphers and Ferro were convicted by the jury not because the Government proved the essential mail element beyond reasonable doubt, but because of the introduction of massive amounts of wrongful acts not related to the particular crimes charged in the indictments, as is more fully set forth in Point V, infra.

shows Dr. Simon, in fact, picked up at least one ticket at Nagin's business establishment. (T. 245) While the record shows some contact between Nagin, and Ferro and Cyphers (T. 197-98) and even possibly contact between Ferro with Dr. Simon (T. 246-47), there simply is no evidence that either Cyphers or Ferro had a plan to mail any tickets to Dr. Simon or that they should have foreseen the mailing. The record at best only shows that it was foreseeable that Mr. Nagin would deliver the tickets to his good friend Dr. Simon, and that Nagin or Dr. Simon in turn would deliver the tickets to Simon's friend, Dr. Sylvan. Indeed, it is not even foreseeable from the record before the Court that Nagin would cause the mails to be used.

The second reason why it was not foreseeable that the mails would be used is, ironically, found in all the wrongful acts so freely used by the Government in this case. As noted above, the Government first brought an indictment against the defendants for forty-three separate counts of alleged mail fraud. However, the Government itself recognized the lack of the mail connection and voluntarily dismissed the indictment. The Government then reindicted for two acts of alleged mail fraud (subsequently one more charge was added) and decided to use some of the remaining charges for the claimed purpose of showing a scheme. The simple and obvious point is that none of these other acts involved the

use of the mails. The first indictment was dismissed for this reason.

Thus, there was not sufficient evidence that Cyphers affirmatively ordered or intended the mails be used. There is not sufficient evidence that the activity engaged in by Cyphers made it foreseeable that the mails would be used to effectuate his alleged scheme. Indeed, all the reasonable inferences to be drawn from the facts in evidence require a finding that such usage was not intended nor foreseeable.

The Government has failed to prove beyond a reasonable doubt that Cyphers used or caused the use of the mails. Therefore, the conviction appealed from must be reversed.

POINT V

THE GOVERNMENT'S USE OF SUBSTANTIAL AMOUNTS OF EVIDENCE OF OTHER WRONGFUL ACTS BY CYPHERS WAS CONFUSING, PREJUDICIAL AND DENIED CYPHERS A FAIR TRIAL

It is fundamental to the American system of justice that an accused must be judged solely on the evidence relevant to the specific offense for which he is indicted -- not for who he is, or what else he may have done. See, Michelson v. United States, 335 U.S. 469 (1948); United States v. James, 208 F.2d 124 (2d Cir. 1953).

The trial court permitted the introduction of massive and repetitive evidence in the Government's case in chief that Cyphers had, in effect, a propensity toward fraudulently obtaining and using credit cards. See supra at 14-16. Much of this "evidence" was inadmissible; and much of it at most tangential, but highly inflammatory, as is more fully set forth below.

As this type of improper "evidence" constitutes virtually the entirety of the Government's presentation against Cyphers, it is apparent that his conviction was a direct result of it, and the cumulative effect was therefore so highly prejudicial that Cyphers was denied a fair trial.

The materials the Government relied on were not alleged to have been used in the crimes for which Cyphers was indicted but were introduced in the prosecutor's case in chief as evidence of other crimes committed by the defendants. Permitting the use of such evidence in the case in chief to show a defendant's propensity to commit the specific crimes charged in the indictment has been rejected by every American jurisdiction.* See e.g. United States v. Ring, 513 F.2d 1001, 1004 (6th Cir. 1975); U.S. v. Anderson, 509 F.2d 312 (D.C. Cir.) cert. denied, 420 U.S. 991 (1975); 2 Weinstein's Evidence ¶ 404[04] at 404-23, 24 (1975).

Despite Cyphers' repeated objections to the intro-

duction of these materials as violative of this well-accepted rule, the trial court admitted them into evidence as being within the exceptions to the rule set forth in Rule 404(b) of the Federal Rules of Evidence. (T. 27-28)**

As noted above, one of the "wrongful acts" which the Government used to convict Cyphers was the alleged wrongful use of a credit card to make a purchase of a record album at a Doubleday Book Shop in New York City. The Assistant U.S. Attorney, in his summation, referred to this "wrongful act" as a "crucial" part of his case against Cyphers. (T. 482)

The sole evidence of this "wrongful act" was the highly questionable testimony of Scott Kale. The Acting District Attorney in New York County had specifically approved the refusal to prosecute Cyphers for a state charge based upon this testimony of Kale. (See Exhibit G to the joint appendix, which includes the Recommendation For Dismissal.) The Assistant District Attorney concluded that Kale's "recollection of the incident is wrong in almost every detail." (Exhibit G at 4)

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* In the federal courts, this rule is codified as Federal Rule of Evidence (Fed. R. Ev.) 404.

** Such a vast quantity of evidence of this kind was offered by the Government, that a form of general standing objection was allowed by the Court (See e.g. T. 144-45). The Court repeatedly acknowledged that all these materials were accepted subject to connection and could be stricken later if no connection was made out. (T. 137; 145.)

Although the trial court allowed the Government to introduce a massive amount of legally inadmissible testimony and documentary evidence of "wrongful acts", the Court would not permit Cyphers to challenge the credibility of Kale by allowing him to introduce into evidence the entire Recommendation For Dismissal which shows Kale's testimony was both tainted and erroneous.* The Court refused to admit the Recommendation For Dismissal even though it was admissible pursuant to Rule 803(8) of the Federal Rules of Evidence and relevant as bearing on Kale's credibility pursuant to Rule 401 and Rule 611 of the Federal Rules of Evidence. (T. 454-57)

While the refusal to permit Cyphers to counter the testimony of Kale as to alleged other wrongful acts was itself prejudicial, it should not overshadow the more fundamental error involved in relation to such evidence. As Judge Learned Hand has stated, it is veritable hornbook law that evidence, even if relevant, which tends to confuse rather than enlighten the jury should be excluded. United States v. Costello, 221 F.2d 668, 674 (2d Cir.), aff'd 350 U.S. 359 (1956). Implementing this principle is Rule 403

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* Instead, the Court admitted only the Certificate of Dismissal, attached as part of Exhibit G to the joint appendix, which records the Indictment was dismissed, but does not state why it was dismissed. (T. 457)

of the Federal Rules of Evidence which provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. The evidence of other wrongful acts introduced by the Government was confusing, and should have been excluded pursuant to Rule 403.

One of clearest indicia of when the risk of confusion outweighs probative value, thus requiring exclusion of the evidence, is whether complex judicial instructions will be required to explain the relevance of the material in issue. Costello, supra; see generally 1 Weinstein, supra ¶ 403[04] at 403-25.

Much of the confusion here results from the language the Court used in explaining 18 U.S.C. §1341, the federal mail fraud statute, and Fed. R. Ev. 404(b). The trial judge repeatedly charged the jury that as to §1341 "a scheme to defraud" was an essential element of the crime*, saying, for example:

> The essential elements which are required to be proved beyond a reasonable doubt in order to establish the offenses charged in the indictment are as follows: One, an act or acts of having devised a scheme or

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* See, e.g., United States v. Goldberg, 455 F.2d 479 (9th Cir. 1972), cert. denied, 406 U.S. 967; Henderson v. United States, 425 F.2d 134 (5th Cir. 1970); United States v. Regent Office Supply, 421 F.2d 1174 (2d Cir. 1970).

artifice to defraud . . . .

> The mail fraud statute, violation of which is charged here, requires only that there be a scheme to defraud and not actual fraud . . . . (T. 540) (Emphasis added)

After instructing the jury on other matters, the Court charged relevant to the evidence of other crimes:

> If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the acts charged . . . then the jury may consider evidence as to an alleged earlier or simultaneous similar act in determining whether there was a plan, scheme or design, or a state of mind, knowledge or intent with which the accused did the acts charged in the indictments. And where all the elements of the alleged earlier or simultaneous similar act are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the acts charged in the indictments the accused acted pursuant to a plan, scheme, or design . . . . (T. 552-53) (Emphasis added)

While lawyers are familiar with the concepts involved, and thus understand there are two different kinds of "schemes" referred to, the jurors, no doubt understood the Court to say that a "scheme to defraud" was a necessary element of the crime, and that they could find this "scheme" by clear and conclusive evidence of prior wrongful acts.

In fact, if the jurors attempted to analyze how this part of the charge related to the evidence in question, they had to understand it to mean that first they must find beyond a reasonable doubt that there was a scheme to defraud, and they could not consider the credit cards seized from Ferro's apartment in making this finding. But once

they determined beyond a reasonable doubt there was a scheme, they could consider the credit cards in determining if there was a scheme, which they only need find by clear and conclusive evidence.

Therefore, either the charge was totally disregarded by the jury, or it led to the unintentional but inescapable conclusion that the evidence of another crime could be used to prove the "scheme" which was an essential element of the crime involved. It is precisely that kind of confusion, and the jury thus being misled, that Fed. R. Ev. 403 is designed to prevent.* See 1 Weinstein, supra § 403[04].

The prejudice of this is no less apparent than the confusion it created. The mere recitation by a prosecutor that evidence of other wrongful acts is offered as an exception to the general rule does not make it admissible. Such evidence cannot be used unnecessarily as a pretext for placing highly prejudicial evidence of a defendant's bad character before a jury where, as here, the defendant has not opened up the issue of his character. United States v. Ring, 513 F.2d 1001 (6th Cir. 1975).

Here it was the Government's claim that Cyphers committed a scheme to defraud by the use of credit cards.

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* Both the jury and the Court were apparently somewhat confused. The jury requested a copy of the Court's special instruction regarding these other acts. The Court reread the same instruction, continued that the jurors should read the indictments and apply its instruction as to these other acts, and added "I do not know if that clarifies it for you or not." (T. 573-76)

The Government then adduced wholesale lots of purportedly altered credit cards allegedly belonging to Cyphers. The jury was neatly presented with the picture that Cyphers and the illegal use of credit cards went hand in hand.

Due to the lack of any direct or compelling circumstantial evidence that Cyphers in any way was connected with fraudulently obtaining the credit cards used in the crimes charged, or evidence that at least two of the airline tickets forming the subject of the indictment were obtained fraudulently, or that either of the defendants in fact caused the tickets to be mailed, it becomes apparent that the jury convicted Mr. Cyphers on this easy but impermissible syllogism: He was a bad man to have around credit cards; the crime charged involved credit cards; therefore, he either was guilty of the crime charged, or he should be found guilty anyway.

This cumulative effect of the showing that a large number of altered credit cards, not related to the crime charged, were allegedly used by Cyphers was necessarily unfairly prejudicial and requires reversal. DeVore v. United States, 368 F.2d 396 (9th Cir. 1966). In other words, Cyphers was convicted not on evidence of guilt of the crimes charged in the indictment, but rather solely on proof purporting to show that he was a "bad man." Such a conviction cannot stand. Michelson, supra; James, supra.

Therefore, the conviction appealed from should be reversed.

POINT VI

CYPHERS WAS WRONGLY DENIED THE RIGHT TO SUM UP ON HIS OWN BEHALF

The record reflects that Cyphers made a timely application to act as his own counsel in order to present a defense for himself. The Court disposed of this in the following manner:

> DEFENDANT CYPHERS: Then I am making application to be appointed as co-counsel, if possible, or if not possible, I must ask for a motion to be my own attorney.
>
> THE COURT: I will let you be your co-counsel for the limited purposes of trying the case with Mr. Preminger. I will not however, let you sum up to the jury.* (January 8, 1976 at 8)

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* As is set forth below, the rights here involved are Sixth Amendment rights, and Cyphers did not waive them. Rule 51 of the Federal Rules of Criminal Procedure provides in pertinent part "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." Cyphers did this by asking to be allowed to represent himself.

Moreover, it is settled law that the trial judge must instruct the defendant seeking to act pro se, no matter how inartfully his request may be phrased, that he has the choice between a defense by counsel and a defense pro se. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964). Where that choice entails giving up what the Court in Herring v. New York, 422 US 853 (1975), suggested is the most essential element of the defense function, i.e. the right to sum up to the jury, the trial judge should be required to advise the defendant of this, rather than allow him to forego a Constitutional right unknowingly.

During the course of the trial the Court repeated its limitation, i.e. that Cyphers would not be permitted to act pro se for purposes of summation (T. 277-78; 430-31).

In the case of Herring v. New York, 422 U.S. 853 (1975), the Supreme Court held that the right of summation for the defense is a basic element of the adversary function. Thus, relying on Faretta v. California, 422 U.S. 806 (1975), it also held that a defendant who exercises the right to conduct his own defense has a right to make a closing argument, i.e., to be heard in summation of the evidence from the point of view most favorable to him. 422 U.S. at 864. Therefore, the Court erred in denying Cyphers the right to conduct his own summation.

(footnote continued)

> Indeed, the instant case is an a fortiori one in that Cyphers, in response to the Court's inquiry as to whether he was fully aware of what he was doing, specifically asked the Court:
>
> "Will you fully advise me of my rights as near as you can?" (January 8, 1976 at 9)
>
> The Court advised Cyphers of his rights but erred in not advising him that he could choose to act as his own counsel (not merely as co-counsel) and that if he did choose to be his own counsel, he would be permitted to sum up to the jury personally.
>
> There is, of course, a strong disinclination to permit the waiver of a Constitutional right -- especially 6th Amendment rights -- by implication. Barker v. Wingo, supra. In any event, such right can only be lost when a waiver is made knowingly and intelligently. United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975). Cyphers' "waiver" here, assuming, arguendo, there was one, could not be a knowing or intelligent one.

Even if this finding were not required by the decision in Herring, supra,* it would follow from the reasoning in Faretta, supra, where the Court made it plain that a criminal defendant has a right to act as his own counsel and that right is not to be stingily allowed:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in may areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution for in a very real sense it is not his defense. (Emphasis by the Court; 422 US at 820-21.)

As the high court added, it would be no solution to suggest that the record here indicates Cyphers' counsel summed up adequately on his behalf and thus no prejudice

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* In fact, Herring involved a deprivation of the right to sum up in a bench trial. It seems it is clear from the Court's language, however, that no distinction would be made in a jury trial. 422 US at 803 n. 15.

flowed from the trial court's error. This would be sheer sophisty, designed to detract the Court's attention from the real issue:

> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Farretta, supra, 422 U.S. at 834.

Cyphers was wrongly denied the right to sum up to the jury on his own behalf. Therefore, the conviction appealed from must be reversed.

CONCLUSION

For the foregoing reasons, the convictions appealed from should be reversed, and the indictments under which Cyphers was charged should be dismissed. In the alternative, the judgment of the trial court should be vacated, and the case remanded for a new trial.

Respectfully submitted,

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